



# Oregon

Tina Kotek, Governor

## Water Resources Department

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Douglas E. Woodcock, Acting Director

**SUBJECT:** Agenda Item H, September 29, 2023  
Water Resources Commission

### Director's Report

#### I. Discussion of the Director's Report Format

Department staff spend a significant amount of time compiling and developing information for this report. The format of the report has remained relatively unchanged for many years; however, the length of the reports have grown over the years due to increased litigation and increased work around the agency. The Department would like to engage the Commission in a discussion about this report and what Commissioner's find valuable. In general, the Department includes the following topics in the Director's report: titles of staff hires and promotions, topics that are brief such as the video series below, topics that are late-breaking or where there is not time on the agenda to discuss in detail, topics that are of ongoing interest such as the Klamath Basin, other Board and Commission meeting dates, and an overview of litigation. In particular, the Department is interested in discussing the format of the litigation update and what components of it are valuable, as well as understanding whether the Commission continues to find value in the meeting schedule for other Boards and Commission and the summary of positions hired.

#### II. Recent Actions and Updates

##### A. Staffing Update

Since the June meeting, the Department has filled eight positions as of the end of July. Of the positions filled, there are seven staff who are new to the agency and one promotional transfer in from another agency. Positions filled include the following:

- Assistant Watermaster (3)
- Hydrologist (Instream Flows and Drought)
- Protest Program Coordinator
- Restoration Program Technician (LD)
- Region Manager
- Well Inspector

There is one additional hire with an accepted offer that has a start date after June. This hire will be detailed in the November meeting Director's Report.

### **B. Project Implementation Updates**

Department staff continue to make progress on implementing the numerous projects resulting from the 2021 legislative session and are starting to plan for new projects resulting from the 2023 legislative session. Many of the tasks resulting from the 2023 legislative session will require the agency to first hire staff to perform the work. Managers are working to draft position descriptions; however, its important to note that some positions were not funded to start until later in the biennium.

Staff are also working to implement the Governor's expectations, with a key focus on completing the Continuity of Operations Plan due September 30, as well as undertaking work to make progress on deliverables due in December including the Succession Plan and Information Technology Strategic Plan. Due to these priorities, we have not made as much progress on moving forward development of the next agency Strategic Plan that will integrate the Diversity, Equity and Inclusion Plan; however, we anticipate that work will gear up in the coming months and will include engagement with the Commission.

Given that much of the work from 2023 is discussed in the legislative update and the Department is working to update project tracking spreadsheets to close out completed projects, the Department will plan to give a more detailed briefing on completed projects, projects underway, and on the work ahead of the agency at the November meeting.

### **C. New Video Series to Increase Awareness of a New Law**

In the 2022 Legislative Session, House Bill 4061 added new requirements for water haulers to maintain paper records of water deliveries for up to one year after the date of delivery. The records are required to be presented to law enforcement or OWRD upon request. The bill attempted to target illegal water use by unregistered cannabis growers.

The Department created handouts, posters, and drafted letters to water haulers to help them comply with the new requirements. Over the last six months, the Department contracted for an animated video series that provided explanatory guidance for water haulers, bulk water suppliers and cannabis growers about their statutory responsibilities. Our communications staff worked alongside the contractor to develop the video series in three languages: English, Spanish and Russian.

The videos can be viewed on our agency's website [here](#).

- IWRS Recommended Action 8.C - Promote Community Education and Training Opportunities

#### **D. Klamath Update**

The Klamath basin has benefitted from rain and snowfall over the winter and occasional rain throughout the summer, resulting in improved water conditions compared to the previous three years. However, the groundwater aquifers have not recharged, resulting in continued low river base flows. The Williamson and Wood Rivers are being regulated to provide available water to the Klamath Tribes instream water rights.

Klamath County did not request a drought declaration from the Governor. Very few dry well complaints have been received from well owners in and near the Klamath Irrigation Project this year. However, dry well complaints are being received near Crescent in both Deschutes and Klamath counties. A total of 506 dry well complaints have been received in Klamath County since 2021.

The Bureau of Reclamation (BOR) allocated 260,000 acre-feet of water from Upper Klamath Lake and the Klamath River for irrigation within the Klamath Project. A full allocation for irrigation is between 350,000 and 400,000 acre-feet. The BOR is monitoring Upper Klamath Lake elevations. Lake levels are declining faster than forecast due to the low streamflows entering the lake, high lake evaporation loss, and low precipitation. End of season lake levels may drop below the set target.

#### **E. Business Case for Water Investments in Oregon**

HB 5006 (2021) provided funding for the Department to contract for a statewide business case to examine the economic value of water investments in Oregon. AMP Insights and OneWater Econ completed the assessment in June 2023. Links to the assessment and executive summary are here:.

[Executive Summary](#)

[Full Business Case Assessment](#)

The report includes a high-level overview of the risks Oregon faces in water management, current water use and demographics, the approach for the economic analysis, economic value and benefits to the state from key water-related industries and activities, select tribal perspectives, illustrative case studies from around the state, and a discussion on the cost effectiveness of investment over non-investment in water around Oregon.

In short, 48% of the state's economic output depends on water and water supports the employment of 44% of all of the state's workers. Our work and our collaborative work with other water related agencies is of vital importance to all Oregonians.

- Integrated Water Resources Strategy Recommended Action 1.C - Coordinate Inter-Agency Data Collection, Processing, and Use in Decision Making and 10.E - Continue the Water Resources Development Program

## **F. Tribal Update**

*Tribal Water Task Force:* As reported at the June 2023 WRC meeting, the Tribal Task Force completed a Task Force Report that was released to the public on August 3, 2023. The report summarizes the key themes that arose from these meetings and provides a set of recommendations on both substantive themes identified and ensuring continued advancement of the stated goals in establishing the Task Force. The Task Force is expected to continue to meet to work on recommendations developed in the Report. The Report is available here: [2023 Tribal Water Task Force Report](#).

*Other Activities and Coordination Efforts:* The Department co-sponsored the Changing Currents Tribal Water Summit, held June 26-30 at the Coquille Indian Tribe's Mill Hotel and Casino in North Bend. Three staff members attended. IWRS Specialist, Crystal Grinnell, presented on and accepted input on the update to the IWRS. The Department's Tribal Liaison and other staff continue to attend and provide policy updates during quarterly meetings held by the Legislative Commission on Indian Services' Cultural Resources Cluster and Natural Resource Working Group. Recent topics have included rulemaking efforts, legislative highlights, the IWRS update, funding opportunities, basin work plans, and water rights. During each update, Tribal staff are invited to offer input and encouraged to request either coordination or formal consultation on any issue of interest or concern.

- Integrated Water Resources Strategy Recommended Action: 9.C - Partner with federal agencies, tribes, and neighboring states in long-term water resources management

## **III. Litigation Update**

### **Circuit Court Filings**

#### **NEW *Rogue River Valley Irrigation District v. Oregon Water Resources Department; Marion Circuit Court, Case No. 23CV19220***

On May 9, 2023, the Rogue River Valley Irrigation District filed a petition for judicial review against a regulatory order issued by the Department. The District stores water in Fourmile Lake in Klamath Basin and diverts it to the Rogue Basin through the Cascade Canal for irrigation use. The order of the Department was in response to a call for water made by the Klamath Tribes to meet the Upper Klamath Lake (lake level) determined claim KA 622.

#### **NEW *Medford Irrigation District v. Oregon Water Resources Department; Marion Circuit Court, Case No. 23CV19218***

On May 9, 2023, the Medford Irrigation District filed a petition for judicial review against a regulatory order issued by the Department. The District stores water in Fourmile Lake in Klamath Basin and diverts it to the Rogue Basin through the Cascade Canal for irrigation use.

The order of the Department was in response to a call for water made by the Klamath Tribes to meet the Upper Klamath Lake (lake level) determined claim KA 622.

**NEW *Brown Saylor Ranch v. Oregon Water Resources Department, Oregon Water Resources Commission; Umatilla Circuit Court, Case No. 23CV26568***

On July 21, 2023, petitioner filed a petition for judicial review against a notice of violation issued by the Department to address unauthorized water use.

**NEW *Piercy v. Oregon Water Resources Department, Oregon Water Resources Commission; Umatilla Circuit Court, Case No. 23CV27740***

On July 12, 2023, petitioner filed a petition for judicial review against a regulatory order and notice of violation issued by the Department to address decreasing flows and unmet senior water rights on the Umatilla River.

**NEW *New Foothills v. Oregon Water Resources Department, Oregon Water Resources Commission; Umatilla Circuit Court, Case No. 23CV27892***

On July 12, 2023, petitioner filed a petition for judicial review against a regulatory order and notice of violation issued by the Department to address decreasing flows and unmet senior water rights on the Umatilla River. The petitioner asserts breach of contract by not enforcing a settlement agreement and a previous owner of the property.

**NEW *Bridgeview Vineyards v. Oregon Water Resources Department, Oregon Water Resources Commission; Josephine Circuit Court, Case No. 23CV28757***

On July 18, 2023, petitioner filed a petition for judicial review challenging a cancellation order issued by the Department for failure to apply water to a beneficial use under the terms of a transfer order.

***Klamath Basin Adjudication; Klamath County Circuit Court***

This adjudication is the process for determining claims to the use of surface water in the Klamath River Basin. On-going since 1975, the first phase was the review and determination of these claims by the Oregon Water Resources Department, including the hearing of contests to claims and the issuance of proposed orders by administrative law judges from the State's Office of Administrative Hearings. This phase of the process was completed with the Department's issuance of and filing of the Adjudicator's Findings of Fact and Final Order of Determination with Klamath County Circuit Court on March 7, 2013.

The process is now in the second phase, which is the review of the Final Order of Determination by the courts. Adjudication claimants or contestants who dispute the Department's determination of their claims or contests had an opportunity to file exceptions with the Klamath County Circuit Court. The court is now reviewing these exceptions and will ultimately issue a water rights decree affirming or modifying the Final Order of Determination.

On July 7, 2023, the court issued an order remanding the tribal claims to the Department for application of the "moderate living standard" consistent with the court's opinion and the Adair line of cases.

**Fort Klamath Critical Habitat Landowners, Inc., et al. v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 21CV37688**

On September 22, 2021, the Fort Klamath Critical Habitat Landowners, Inc. filed an amended petition for judicial review opposing a temporary transfer of the place of use and points of diversion of a determined claim from the Wood River Valley, above Upper Klamath Lake (UKL), to the Lower Klamath National Wildlife Refuge below UKL. The court granted an extension of time for this case on December 29, 2021. On January 20, 2022, the petitioners filed a second amended petition for judicial review. On August 18, 2022, petitioners filed a third amended petition for judicial review. Oral argument was held on December 15, 2022, in Marion County Circuit. The Court issued an opinion letter dated February 21, 2023, ruling in favor of the Department, followed by the supporting order on April 21, 2023. A notice of appeal was filed on May 17, 2023 by the petitioners.

**Annunziata Gould. v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 21CV48665**

On December 22, 2021, Deschutes County resident Annunziata Gould filed a petition for judicial review of a final order of the Department granting a temporary change in place of use and points of groundwater appropriation in the Deschutes Basin. Temporary transfer applicant, Pinnacle Utilities, filed a motion to intervene in the case, which was approved. On May 15, 2023, the Department issued an order denying a request to lift the automatic stay, which was filed by Pinnacle Utilities. Upon request of Pinnacle Utilities, a hearing was held in Marion Circuit Court August 11, 2023, on the denial to lift the automatic stay. During the hearing the judge ruled in the Department's favor, affirming the position that the automatic stay is maintained. A trial for this case is scheduled for Jan 16-19, 2024.

**Klamath Irrigation District v. Oregon Water Resources Department; Marion County Circuit Case No. 21CV39570**

On October 1, 2021, Klamath Irrigation District (KID) filed a petition for judicial review in Marion County Circuit Court. The petition was filed in response to an order issued by the Department on April 6, 2021, to the U.S. Bureau of Reclamation regarding releases of stored water from Upper Klamath Lake. The order to Reclamation was issued in compliance with an order from Marion County Circuit Court directing the Watermaster to prevent releases of stored water in excess of water rights entitled to the use of that water. Petitioners and the Department jointly filed a motion to stay the case, which was signed by the court April 15, 2022. On July 7, 2023, KID refiled the petition for judicial review.

**Pinnacle Utilities, LLC v. Oregon Water Resources Department; Deschutes County Circuit Court, Case No. 22CV08683**

On March 11, 2022, Pinnacle Utilities filed a petition for judicial review challenging an order of the Department denying a limited license application. The Department filed a motion to dismiss, which was heard on August 22, 2022, and was denied by the court on September 19, 2022. A hearing date has been set for April 9, 2024.

**Earth and Water Works v. Oregon Water Resources Department; Union County Circuit Court, Case No. 22CV24108**

On July 21, 2022, Earth and Water Works, Inc. filed a petition for judicial review in response to an order approving a special well construction standard requiring abandonment of a deep water well that was compromised during construction. The Department withdrew its order for reconsideration on October 18, 2022, and on October 26, 2022, the parties agreed to a stipulated motion to stay the case as they discuss next steps in resolving this issue.

***Sprague River Cattle Company v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 22CV27077***

On August 15, 2022, Sprague River Cattle Company filed a complaint and demand for a jury trial due to the State's quantification of the Klamath Tribes' federal reserved water rights in the Klamath Basin Adjudication. The suit asserts that quantification and subsequent regulation of rights junior to those claims has resulted in reduced property value. Plaintiff seeks monetary damages. The Department moved the case to Federal District Court but was subsequently remanded to Marion Circuit Court. The case was transferred from Marion Circuit Court Judge Abar to Judge Bennett. The hearing is scheduled for January 22, 2024, on a motion for summary judgement, and a trial date is set for May 2024.

**Court of Appeals Filings**

***WaterWatch of Oregon v. Oregon Water Resources Department, et al; Oregon Court of Appeals, Case Nos. A169652, S32410 and S37839 (Lower Clackamas River)***

WaterWatch appealed a Department order supplementing and clarifying previous orders on municipal water rights, pursuant to a remand from the Court of Appeals. The Department approved municipal permit extensions in 2010, which WaterWatch appealed, and the court remanded the orders to OWRD for clarification. A hearing was held and the order on remand was issued in 2018. WaterWatch appealed. Oral arguments were heard January 8, 2021. On March 3, 2023, the Court of Appeals ruled that the Department's orders are affirmed. On May 5, 2023, WaterWatch filed a petition for review of the decision. The Supreme Court denied the request of the review on August 31, 2023.

***East Valley Water District v. Oregon Water Resources Commission, et al; Oregon Court of Appeals Case No. A173292***

This appeal, filed with the court in January 2020, challenges an order of the Oregon Water Resources Commission that denies a reservoir application filed by the water district. Multiple extensions on filing briefs were requested by the parties. Petitioners East Valley Water District and WaterWatch of Oregon filed opening briefs on February 25, 2021. On July 27, 2021, WaterWatch's petition for judicial review was dismissed for lack of standing, and WaterWatch's motion for reconsideration of that order was denied on October 4, 2021. Oral arguments were heard November 3, 2022. The Department is awaiting a decision.

***Klamath Irrigation District v. Oregon Water Resources Department; Oregon Court of Appeals, Case Nos. A176270 (Marion Circuit Case No. 20CV17922)***

On May 14, 2020, Klamath Irrigation District (KID) filed a Complaint for Declaratory and Injunctive Relief in Marion County Circuit Court. The complaint was filed under ORS 183.490 and ORS 540.740. KID is seeking an injunction compelling the Department to carry into effect

the Amended and Corrected Order of Determination (ACFFOD) in the Klamath Adjudication by ordering the Bureau of Reclamation (BOR) not to divert stored water through the Link River Dam for instream purposes unless or until it obtains a water right or instream lease authorizing the use of water for such purpose, obtains a stay of the ACFFOD pursuant to ORS 539.180, or obtains a final judgment providing that federal law authorizes the BOR to use stored water in UKL reservoir for instream purposes without securing a water right in accordance with state law and the Reclamation Act.

A hearing was held in Marion County Circuit Court on June 18, 2020. On July 30, 2020, Judge Bennett issued an opinion letter approving the KID's motion for partial summary judgment on the injunction claim under ORS 540.740 and denying the Department's motions on the same claim. An order was issued October 13, 2020, by the court. In June 2021, the Department appealed the Circuit Court order. On December 27, 2021, the Oregon Court of Appeals issued an order granting a stay and expediting the case. Oral argument was held on July 15, 2022. On September 8, 2022, an order issued by the Court of Appeals reversed the Marion County Circuit Court judgement. KID filed a petition for review with the Oregon Supreme Court on December 24, 2022. On April 20, 2023, the Supreme Court denied KID's petition for review. On July 8, 2023, the Court of Appeals issued a judgement reversing and remanding the Marion Circuit decision with instructions to dismiss the complaint. The Marion Circuit Court order directing WRD to "take control" of the Link River Dam and prevent BOR from releasing water except for state water rights was reversed.

**Klamath Irrigation District v. Oregon Water Resources Department; Oregon Court of Appeals, Case No. A175510 (Marion Circuit Case No. 20CV17922)**

This appeal also stems from Marion Circuit Court case number 20CV17922 (above), and is brought forth by Pacific Coast Federation, WaterWatch, and the Yurok Tribe appealing the orders denying their motions to intervene in the limited judgement from that case. This case is abated pending review of 20CV17922 with the Oregon Supreme Court. With the April 20, 2023, denial of KID's petition for review (previous case above) this case may be dismissed.

**U.S. District Court**

**NEW Buchanan v. Oregon Water Resources Department and Oregon Water Resources Commission; Klamath Circuit Court, Case No. 23CV19023; moved to U.S. District Court, Medford, Oregon, Case No. 1:23-cv-00923-CL**

This is the lead case along with five other cases, all consolidated at U.S. District Court (**Buchanan** 1:23-cv-00925-CL; **Hartman, et al** 1:23-cv-00927-CL; **Stilwell** 1:23-cv-00930-CL; **Knoll** 1:23-cv-00929-CL; **Knoll** 1:23-cv-00928-CL).

These cases involve petitions for judicial review filed against regulatory orders issued by the Department on behalf of the Klamath Tribes' call for water to meet the Upper Klamath Lake determined claim KA 622 (lake stage). On July 12, 2023, the Department issued an order denying the automatic stay that comes with the filing of a PJR. At the petitioner's request, a hearing was held on the automatic stay on July 28, 2023. On August 9, 2023, the Federal District Court affirmed the Department's orders denying the automatic stay. On August 14, 2023, the two Buchanan cases (1:23-cv-00923-CL and 1:23-cv-00925-CL) were voluntarily dismissed.



**Klamath Irrigation District v. United States Bureau of Reclamation; U.S. District Court, Medford, Oregon, Case No. 1:21-cv-00504-AA**

On March 29, 2021, the Klamath Irrigation District filed an emergency motion for preliminary injunction against the Bureau of Reclamation in Klamath County Circuit Court, which is managing the judicial phase of the Klamath adjudication. The preliminary injunction was filed to prevent the Bureau of Reclamation from using stored water contrary to the water rights determined in the Amended and Corrected Findings of Fact and Order of Determination.

On April 5, 2021, the Bureau of Reclamation filed notice with the court of removal of the case to the U.S. District Court of Oregon. On April 12, 2021, Oregon Water Resources Department filed a motion to intervene in the case, which was granted. On April 20, 2021, Klamath Irrigation District filed a motion to remand the case back to Klamath County Circuit Court. The hearing on remand was held at U.S. District Court on May 20, 2021. On April 21, 2022, the court denied the motion to remand. KID filed a second mandamus with the U.S. Court of Appeals to compel the District Court to remand this case back to the Oregon state court. On June 5, 2023, the U.S. Court of Appeals issued an opinion denying KID's remand.

**United States of America v. Oregon Water Resources Department; U.S. District Court, Medford, Oregon, Case No. 1:21-cv-1442**

On October 1, 2021, the United States filed a complaint challenging the April 6, 2021, final order of the Department issued against the Bureau of Reclamation relating to the release of stored water from Upper Klamath Lake, as well as two notices of violation. Additionally, the complaint contained a petition for judicial review under the Oregon Administrative Procedures Act. A hearing was held on a motion to stay, which was subsequently granted on March 3, 2022.

**Yurok Tribe, et al. v. United States Bureau of Reclamation and National Marine Fisheries Service; U.S. District Court, Northern California, Case No. ND CA3:19-cv-04405**

In 2019, Yurok Tribe and others challenged the final Biological Opinion under multiple Endangered Species Act and National Environmental Policy Act provisions. Klamath Water Users Association, Klamath Irrigation District, and Klamath Tribes filed as intervenors in the case. In October 2021, the United States filed a crossclaim in this case against the Department to bring the State of Oregon into the federal case. The crossclaim centered around the April 6, 2021, order issued by the Department (as directed by Marion Circuit Court) to the Bureau of Reclamation relating to the release of stored water from Upper Klamath Lake.

On April 7, 2022, the Department filed a counterclaim against the United States. Motions for summary judgement were filed by the intervenors. A hearing was held December 7, 2022, on the motions and the Department's counterclaim. On February 6, 2023, the court issued an order granting summary judgement to the United States, stating the Bureau of Reclamation is required to manage operations to meet the requirement of the Endangered Species Act, and the order issued by OWRD regulating the Bureau is preempted by ESA. On April 4, 2023, Klamath Irrigation District and Klamath Water Users Association filed appeals of the court's order on summary judgement. A hearing is set for August 23, 2023.

#### **IV. Upcoming Board and Commission Meetings**

##### **Commission / Board**

Land Conservation and Development Commission  
Parks and Recreation Commission  
Fish and Wildlife Commission  
State Land Board  
Environmental Quality Commission  
Watershed Enhancement Board  
Board of Agriculture

##### **Date**

November 2-3, 2023  
September 19-20, 2023  
December 14-15, 2023  
October 10, 2023  
November 16-17, 2023  
October 23-25, 2023  
November 14-16, 2023

##### **Attachments:**

1. Rulemaking Calendar

## Oregon Water Resources Department Current Rulemaking

Rule Division	Topic	Lead Staff	GWAC Input?	Target Adopt Date	Status
<b>Division 10 – Process for Critical Groundwater Area (CGWA) Designation</b>	Conform Rules with ORS 537.730–742 / Establish Framework for CGWA Designations	Ivan Gall, Tim Seymour, Kelly Meinz	Yes	Sept. 2023	Commission consideration of final proposed rules
<b>Groundwater Allocation</b>	Updates for Sustainable Evaluation of New Water Rights, Protective of Senior Right Holders	Annette Liebe, Justin Iverson, Laura Hartt	Yes	Spring 2024	RAC 1-6 completed in April/May 2023
<b>Division 512 – Malheur Lake Basin Program</b>	Update to Basin Rules Following Publication of Groundwater Study CGWA	Ivan Gall, Tim Seymour, Kelly Meinz	Yes	Fall 2024	RAC 2 complete, next RAC October 2023
<b>HB 3293 (2021) Water Project Community Engagement Plans</b>	Rules regarding best practices for equitable community engagement plans for funding programs	Dr. Kim Fritz-Ogren, Charlotte Regula-Whitefield, Laura Hartt	No	2024	Research and planning underway
<b>HB 2020 (2023) Voluntary Agreements</b>	Establish criteria for voluntary water agreement ORS 537.525 within a shared groundwater reservoir	Ivan Gall, Tim Seymour	Yes	2024	Assessing staffing
<b>Divisions 205, 240 Welding for Well Construction</b>	HB 3343 (2023) – Welding training requirements for well driller licensing	Annette Liebe, Kris Byrd, Laura Hartt	Yes	TBD	1 <sup>st</sup> draft rules prepped

This list contains rulemakings that are actively being worked on. Additional rulemakings are on hold and will be prioritized as resources allow. The 2023 Legislative Session included additional rulemaking work which will be added to the current backlog and will be prioritized based on staffing resources.